LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 17 1967
JOHN F. DAVIS, CLERK

PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

No. 735

(1) Jake Klein, (2) Julian Garrett, and Loyat Bland Garrett, Husband and Wife,

Plaintiffs

vs.

The United States,

Defendant.

Julian Garrett, and Loyat Bland Garrett, Husband and Wife, Neill Garrett and Pearl Garrett, Husband and Wife, and Earl Wagner, Third-Party,

Plaintiffs

vs.

The United States,

Defendant.

Bert A. Bandstra
116 1/2 East Main
Knoxville, Iowa 50138
Attorney for Plaintiffs

INDEX

Judgment and rulings asked to be reviewed	2
Questions submitted	3-4
Statement of the case	7-11
Argument	11-27
Allegations of taking in petition	15-20
Defendant's "answer" in argument	20-21
Certificate of Service	27
Opinion of Court of Claims	Appendix

Laws or statutes involved

28 U.S.C. 1255. Jurisdiction, Certiorari	2
Constitution of U.S., Fifth Amendment	4
28 U.S.C. 1491. Tucker Act	4
28 U.S.C. 1358. Eminent domain. Jurisdiction to condemn real estate	5
28 U.S.C. 1403. Same	5

INDEX

28 U.S.C. 1652. State laws as rules of decision 5

40 U.S.C. 257. Condemnation of realty 5

40 U.S.C. 258a. Requirements of declaration of taking law 5-7

Cases

Burt v. U.S. 145 Ct. Cl. 282, 170 F. Supp. 953, (1959) 13

Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 121 N.W. 2d 205 (1963) 24-25

Erie Rr. Co. v. Tompkins, 304 U.S. 64, 78 25

Foman v. Davis, 371 U.S. 178, 182 (1962) 25-26

Handelman v. U.S., 357 F. 2d 694, 698 (1966) 13

Kennecott Copper v. U.S. 357 F. 2d 275, 294 (1965) 13

State v. Evans, 99 Minn. 220, 106 N.W. 958 (1906) 13-14

IN THE SUPREME COURT OF THE
UNITED STATES

No. _____

(1) Jake Klein, (2) Julian Garrett,
and Loyat Bland Garrett, Husband and
Wife,

Plaintiffs

vs.

The United States,
Defendant.

Julian Garrett, and Loyat Bland Garrett,
Husband and Wife, Neill Garrett and Pearl
Garrett, Husband and Wife, and Earl Wagner,
Third-Party,

Plaintiffs

vs.

The United States,
Defendant.

Bert A. Bandstra,
for Plaintiffs

Howard O. Sigmond
Edwin L. Weisl, Jr., Asst. Attorney
General Solicitor General, for
defendant.

PLAINTIFFS' PETITION FOR WRIT
OF CERTIORARI

---

1. The plaintiffs' petition for the review by writ of certiorari of (1) the judgment and opinion of the Court of Claims in the above entitled consolidated cases and reported in F 2d ; (2) the ruling of the said court denying the plaintiffs' Motion for Leave to Amend; and (3) the ruling of the said court denying the plaintiffs' Motion to Review and Vacate the said judgment.

2. The said opinion was filed April 14, 1967, and is appended hereto; the order denying plaintiffs' motion for leave to amend was filed April 14, 1967; and the order denying the plaintiffs' motion to review and vacate the said judgment was filed July 20, 1967.

3. A general, unrestricted jurisdiction to entertain such petitions for Writ of Certiorari is conferred by:

> 28 U.S.C. 1255. Court of Claims; Certiorari; certified questions.
> Cases in the Court of Claims may be reveiwed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted on petition of the United States or the claimant;
> *******

4. The principal questions to be submitted are:

(a) Did the plaintiffs, in their petitions as amended, adequately allege a taking and a cause of action under the Fifth Amendment of the Constitution of the United States and the Tucker Act against the defendant for the taking of gravel, gravel rights and gravel contracts, and gravel business, belonging to the plaintiffs?

(b) Did the defendant conclusively disprove the allegations of the plaintiffs' petitions so as to entitle it to summary judgment (1) by stating in written briefs and arguments affirmative defenses of frustration, confession and avoidance, and res judicata based on void and interlocutory rulings from the United States District Court for the Southern District of Iowa; and (2) by presenting to the lower court improperly and ex parte one of the said void and interlocutory rulings?

(c) Did the lower court err in refusing the plaintiffs leave to file a second amendment to the petitions so they could controvert the said void and interlocutory rulings, when such matters were new matters and sub-

sequent in time to the plaintiffs' petitions, and upon which the Court of Claims based in part its granting of the defendant's motion for summary judgment?

(d) Should not the plaintiffs' motions for summary judgment have been granted when the record shows that the defendant admitted liability for the taking of the gravel contracts?

5. The laws involved in the case are:

Constitution of the United States, Fifth Amendment: *** nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just conpensation.

28 U.S.C. 1491. Claims against United States generally; ***

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

*******.

28 U.S.C. 1358. Eminent domain.

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

28 U.S.C. 1403. Eminent domain.

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located, or, if located in different districts in the same State, in any of such districts.

28 U.S.C. 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

40 U.S.C. 257. Condemnation of reality for sites and other uses; jurisdiction.

* * * * *

40 U.S.C. 258a. Same; lands, easements, or rights-of-way for public

use; taking of possession and title in advance of final judgment; authority; procedure.

* * * * *

Said declaration of taking shall contain or have annexed thereto-

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate

> or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; * * * * *

STATEMENT OF THE CASE

These two cases, consolidated below, arose from the claims of the parties to two gravel contracts, for just compensation for the subsequent taking without condemnation by the defendant of the gravel contracts and gravel rights, the gravel itself, and the parties' gravel business. The two gravel contracts covered two farms owned by the plaintiffs, Garrett, who were the grantors in the contracts. The grantees were the plaintiff Wagner in the contract on one of the farms (case 66-66 below), and the plaintiff Klein in the contract on the other farm. (Case 60-66 below)

Subsequent to the execution and recording of the contracts the defendant by declarations of taking in February and December of 1962, took the fees simple of the two farms for the Red Rock Dam Project and deposited "estimated just compensation" in the registry of the United States District Court for the Southern District of Iowa, in which court the declarations of taking

were filed. There was no mention of gravel, gravel rights, gravel contracts or gravel business. A large part of the monies deposited were paid to the Garretts as owners of the land, but the defendant refused to pay any compensation to the plaintiffs Wagner and Klein, and refused to bring any proceedings as to the said gravel contracts, etc., and refused to deposit any money as estimated just compensation for said gravel contracts, etc.

The defendant forbade the performance of the contracts and brought legal proceedings to prevent the performance of the contracts and threats of imprisonment were made as to anyone trying to perform the contracts. The defendant then provided thousands of tons of gravel from the plaintiffs' land covered by the gravel contracts, to customers of the plaintiff gravelmen and such customers hauled away thousands of tons of gravel, all without compensation to the plaintiffs, and after denying that the plaintiffs had any right to compensation for the gravel contracts, etc.

The gravel contracts were for terms of five years and provided that the gravel was to be removed as soon as practicable. A royalty of 10¢ per cubic yard was to be paid to the landowners, the plaintiffs Garrett, as the gravel was taken out. The Garretts remained in possession of all the gravel land, under leases from the defendant, for more than the five year term of the contracts. During this time the de-

fendant did nothing with this land except to collect rent from the Garretts. The land has not been flooded and the Dam will not be operational until after, perhaps several years after, June 1, 1969. Nothing about the construction of the dam would have interferred in any way with the performance of the gravel contracts, and the performance of the gravel contracts would not have interferred with in any way the construction of the dam.

On February 21, 1966, and February 23, 1966, the plaintiffs filed the present actions in the Court of Claims. The Court of Claims has jurisdiction over these cases under the Fifth Amendment of the Constitution of the United States, and under the Tucker Act, 28 U.S.C. 1491. The defendant then brought the condemnation cases to trial in the district court, one trial beginning April 4, 1966, and the other beginning May 16, 1966. The defendant, completely reversing its position, moved that the District Court give instructions to the condemnation commission authorizing the commission to determine what amount, if any, of the award made for the land to the Garretts should be awarded to the gravel-contractors, Wagner and Klein, for the gravel contracts. The District Court had previously instructed the commission that the gravel could be valued only as land and as part of the land and that it could not be valued as "merchandise". There was no reference to making any award for the gravel contracts to the Garretts who, of course,

also were parties to the gravel contracts as grantors, for the loss of the royalty rights provided for by the said contracts. The defendant's motions were sustained and the instructions given over the objection of the Garretts. The commission awarded $5000.00 to Wagner and $1000.00 to Klein out of the awards made to the Garretts for the land. No payment or award of any kind was ever allowed to the Garretts for the gravel contracts.

In its opinion of April 14, 1967, (appended hereto) the Court of Claims refers to the trials of the condemnation cases before the condemnation commission in the District Court and particularly to certain memoranda (which were not final judgments) of the district court dated October 19, 1966, and December 13, 1966, in which the District Court confirmed the commission's awards of $5000.00 to Wagner and $1000.00 to Klein. Copies of the memoranda had never been furnished or sent to the plaintiffs and the plaintiffs submit that the Court of Claims received one of such memoranda ex parte.

The final judgments in the district court condemnation cases being subsequent to the plaintiffs' petition and their first amendment to their petition, the plaintiffs moved for leave to file a second amendment in the Court of Claims. In their second amendment to their petitions the plaintiffs met and controverted the district court memoranda which was new matter

in the Court of Claims in the cases at bar and part of which new matter the Court of Claims had already received ex parte. But, on the same day, April 14, 1967, that the Court of Claims filed its opinion, which is hereto appended, granting the defendant's motions for summary judgment and denying the plaintiffs' cross-motions for summary judgment, the Court of Claims denied the plaintiffs' Motion for Leave to Amend. The plaintiffs then filed their Motion to Review and Vacate Judgment which Motion the Court of Claims denied on July 20, 1967. The plaintiffs then made their application to the clerk of the Court of Claims under the rules of that court for a certification of the record to the Supreme Court for the purpose of filing a petition for a writ of certiorari and the plaintiffs received a letter dated September 28, 1967, from the Clerk stating that the record was being transmitted to the Supreme Court.

ARGUMENT

The granting of the defendant's Motions for summary judgment and the denial of the plaintiffs' Cross-Motions rests upon two affirmative defenses which were neither pleaded nor proved. In the words of the Court of Claims' opinion of April 14, 1967, which is hereto appended, they are (1) "to the extent the gravel contracts gave an interest in land, that interest has been paid for in the condemnation suits" and (2) "but that, to the extent these contracts were personal property, they were not taken by United States

at all but simply frustrated as in the cases cited." The plaintiffs submit that the gravel contracts cannot be divided in any such fashion.

The plaintiffs agree that the gravel contracts were not taken by the defendant in the condemnation cases. The contracts were, however, taken by the defendant, without condemnation. The plaintiffs had no remedy in the condemnation cases and were therefore compelled to seek their remedy under the Tucker Act. It is conceded by all parties that only land was included and taken in the condemnation cases. It is also conceded, and found by the Court of Claims in its opinion of April 14, 1967, that "No mention was made of the gravel contracts or of the gravel rights in any of the documents filed in any of the proceedings, ***" in the condemnation cases. Yet the Government's authority and power to take property depends entirely upon its compliance with the declaration of taking law, 40 U.S.C. 258a under which it must state the property being taken together with its estimate of just compensation therefor and file its declaration of taking in court and deposit in court the amount of money it had estimated as just compensation. The land was listed in declarations of taking and monies deposited as estimated just compensation, and a large part of said monies was paid to the landowners for their land. But nothing was paid and the defendant refused to pay anything whatsoever for the gravel contracts or to the gravel-men, and such conduct in the defendant clearly established that it did not intend to

and did not take the gravel rights and contracts by condemnation.

Presumably the Court of Claims employed the term "interest in land" in its opinion of April 14, 1967, as stated above, as being synonymous with land. But an "interest in land" may well be, as it is in the instant cases, personal property. Indeed, the Court of Claims itself holds that easements and mineral leases are not land. Thus, in Kennecott Copper v. U. S., 347 F. 2d 275, 294 (1965) the Court of Claims held that:

> The surface rights acquired by plaintiff were easements in, over and under land. An easement is a right of one in the land of another. It is not the land itself.

And in Handelman v. U. S., 357 F. 2d 694, 698 (1966) the Court of Claims said:

> One more crucial step in setting the background of the present issue was decided in the Burt case (Burt v. U. S., 145 Ct. Cl. 282, 170 F. Supp. 953, 1959) and again is not challenged. The court held that the leasehold interest held by the lessee was not a purchase of the property and that the owner of the land remained the owner of the minerals upon which the tax was levied. The court cited as authority for that position State v. Evans, 99 Minn. 220, 106 N.W.

958 (1906), in which the Supreme Court of Minnesota stated, at page 227:

> "The propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land. ***"

It is interesting to note that the Court of Claims followed and freely adopted the law of the State of Minnesota in the case just cited, but, as indicated near the close of its opinion of April 14, in the instant cases, it does not seem disposed to follow the law of the State of Iowa.

In any event the record does not support the holding of the Court of Claims that the gravel contracts, as an interest in land, were paid for in the condemnation cases. The position of the Court of Claims is, necessarily, that the decisions of the District Court are res judicata on such issue. In the first place it is not even claimed that the plaintiffs, Garrett, who were also parties to the gravel contracts, were awarded anything for the loss of their royalty rights provided for in the contracts. Furthermore, res judicata is an affirmative defense that must be pleaded and proved. And this is a requirement of the Court of Claims' own rules, Rule 19 (b) as well as being the general rule.

Also, only final judgments are admissible in support of pleas of res judicata, and there is no final judgment of the District Court in the record. The District Court rulings of October 19, 1966, and December 13, 1966, as referred to by the Court of Claims in its opinion of April 14, 1967, are not final judgments and are not properly in the record. Actually these rulings are void as to the gravel matters, the district court and the Government having no jurisdiction over the gravel contracts, the gravel contracts not having been included in the condemnation cases.

The counsel for the plaintiffs states professionally that appeals have been taken from the rulings and judgments of the District Court in both condemnation cases to the Court of Appeals of the Eighth Circuit and that one of the propositions to be submitted to the appellate court is that the District Court had no jurisdiction over the gravel contracts in the condemnation cases and that the awards made for the gravel contracts were without jurisdiction and void.

The holding of the Court of Claims in its opinion of April 14, 1967, that the gravel contracts, as personal property, were not taken by the United States but were frustrated, is not supported by the record. In their Petition filed February 23, 1966, the plaintiffs alleged:

> 8. That the defendant has forbidden the performance of the said gravel

contract, Exhibit A, and has required and forced the said Earl Wagner to remove his gravel equipment from the said land; and the said Earl Wagner then discontinued his gravel operations on said land and made no further effort to perform his contract.

9. That thereafter, on June 11, 1963, an original notice identical to the original notice that had been served upon the plaintiffs Garrett on February 26, 1962, was served on the said Earl Wagner; and that said notice did not include or make any reference whatsoever to gravel and gravel rights or to gravel contracts or to the said gravel contract Exhibit A.

10. That in December, 1964, the defendant removed and hauled away quantities of gravel from the said land.

11. That the defendant has taken from the plaintiffs the gravel rights provided for by the said gravel contract, Exhibit A, and gravel covered by said contract, without the institution of any condemnation proceedings whatsoever as to said rights and property; that the said defendant has refused to bring any condemnation pro-

ceedings against said gravel rights and gravel, and the said defendant refuses to pay or deposit and has not paid or deposited any money whatsoever as just compensation, estimated just compensation or damages for having taken from and deprived the plaintiffs of the use and benefits of their said gravel contract and the gravel covered by said contract.

In their first amendment to their Petition the plaintiffs alleged:

2. That the said gravel bearing land is not within any construction area, and that the said land has not been physically entered upon by the defendants; that the actual physical possession of the said land has remained in the said plaintiffs' Garrett from the spring of 1942 to the present time, and that the said plaintiffs Garrett have the said land rented from the defendant until March 1, 1967, and that they are entitled to continue in the possession of said land until said time, to wit, March 1, 1967; that there has been some assurance by the defendant that the said plaintiffs may continue to rent the said land after March 1, 1967;

3. That the building of the Red Rock Dam has not, as yet, physically affected said land in any way, and that it is anticipated that the said land will not be flooded until the said Red Rock Dam is in actual operation, and that the defendant has stated that it is expected that the Dam will be operational about June 1, 1969;

4. * * *

5. That the said gravel contracts, plaintiffs' Exhibits A, are both for terms of five years beginning in 1962 and terminating in 1967, and both contracts provide for renewal periods of five years, and that the performance of said contracts for the full terms of five years, and for a part of the said renewal periods of five years, would not have interfered with or prejudiced in any way, the construction of the Red Rock Dam;

6. That the construction of the Red Rock Dam has not interfered with or affected, in any way, the performance of the said gravel contracts; that the said Red Rock Dam, itself, would not interfere in any way, or prevent the performance

of the said gravel contracts until it is in actual operation, which will be some time after June 1, 1969;

7. That the plaintiffs Jake Klein and Earl Wagner were prevented from performing the said contracts by the direct action of the defendant, which action was taken with the intention of stopping and preventing the performance of the said contracts; that said action included, also, the bringing of certain legal proceedings to make sure that said contracts were never performed, and the making of threats to jail anyone attempting to perform said contracts;

8. That thereafter the said defendant furnished thousands of tons of gravel from the land covered by the said gravel contracts, Exhibits A, to former gravel customers and prospective gravel customers of the plaintiffs Jake Klein and Earl Wagner;

9. That the aforesaid conduct of the defendant was a taking in the constitutional sense, of the plaintiffs' said gravel contracts, Exhibits A, and the use and benefits of said contracts, and the rights and in-

> terests created and resulting from the said contracts, and that the said conduct of the said defendant was, also, a taking in the constitutional sense, of the gravel business of the plaintiff Jake Klein and the plaintiff Earl Wagner; and that said taking was probably intended by the defendant to relate back to the time of the taking of the fee simple of the said gravel bearing tracts;

Leave to file the plaintiff's First Amendment was first denied, then allowed.

The defendant, on August 17, 1966, filed its "Defendant's Brief in Support of Commissioner's Report on Defendant's Motions and Plaintiffs' Cross-Motions for Summary Judgment in which reference was made to paragraph 8 of the Plaintiffs' First Amendment at the bottom of page 3 and the top of page 4 as follows:

> "The plaintiffs allege that the defendant prevented them from developing their sand and gravel contracts by making them stop excavating gravel. They make a distinction between the acquisition of the fee simple title by condemnation and interference with possession by actions of the officers of defendant or the eventual flooding. The plaintiffs allege further that the defendant furnished

thousands of tons of gravel to gravel customers of the plaintiffs. 1/"

"1/ This allegation is denied. Defendant admits that in November, 1962, it instructed the plaintiffs to cease the gravel mining operations as shown by Plts. Ex. C. to the Cross-Motion for Summary Judgment in Case No. 66-66 but defendant alleges that it did not sell any gravel from this pit. Defendant has been informed that the project manager permitted the county in the area to take such gravel as it needed to use on the local county roads without payment to defendant. Since the defendant had acquired title in February of 1962, it was perfectly proper to deal with this property as defendant's and to tell plaintiffs not to mine gravel. The action of the project manager in permitting the county to haul gravel away concerns a matter about which plaintiffs have no interest."

Apparently the lower court felt that this "denial" and the "allegations" made by defendant not by answer, but by mere statements, some of which were hearsay, in argument, conclusively refuted or disproved the allegations of the plaintiffs' Petition as amended, so as to

entitle defendant to summary judgment. The allegations in the Petition should govern. But the defendant, although outside the rules of pleading, has attempted to join issue with the plaintiffs. Under these circumstances, the plaintiffs submit, the defendant has waived its motion for summary judgment and its conduct estops it from further assertion of its said motion. Unquestionably the plaintiffs have alleged a taking of the gravel contracts by deprivation, and by direct, affirmative and intended action by the defendant, as well as a taking of their gravel business by the defendant. The record shows a disregard of the adversary principle and a denial of the due process of the law to the plaintiffs. If the defendant wishes to plead general denials or affirmative defenses let it do so by answer, as by law provided, and then let there be a trial on the merits, as favored by the law.

Although the plaintiffs have argued strenuously throughout the record in the Court of Claims that the gravel contracts were personal property and therefore not included in condemnation proceedings that could have jurisdiction only over land, the acts of the defendant in the condemnation cases in the District Court may make this question immaterial. The defendant, and the defendant alone, as the agent of the Congress, selects the properties to be included in its declarations of taking and the defendant, and the defendant alone, estimates the "estimated just compensation" that it is required by 40 U.S.

258a to deposit when its declarations of taking are filed. Although the gravel contracts were personal property, the defendant still could fail to include them and deposit "estimated just compensation" for them even if they were real property. The gravel contracts were not listed in the declarations of taking and they were not included by implication in the declarations of taking because the defendant did not intend that they be so included. If the gravel contracts were taken in the condemnation cases the law requires the defendant to pay out immediately the "estimated just compensation" deposited for them. But the defendant refused to pay out anything to the gravelmen. The defendant's intentions must be determined by its acts.

But after the plaintiffs brought their actions in the Court of Claims under the Tucker Act the defendant moved that the condemnation commission be authorized to make awards, to be taken from the awards made for the land, to the gravelmen and this was done. But, as pointed out by the plaintiffs in their proposed second amendment, which the Court of Claims refused to let them file, the awards to the gravelmen were to be paid when deposited. The money still remaining in the District Court as originally deposited with the Declarations of Taking back in 1962 were not to be used to pay these awards. New deposits were to be made.

The plaintiffs submit that property cannot be added to property taken by declarations of

taking in any such fashion. A new declaration of taking or at least an amendment of the old one would be required listing the new property and "estimated just compensation" would have to be deposited to cover the new property. This was not done and the plaintiffs had already conferred jurisdiction on the Court of Claims by filing their Petitions in February, 1966.

The acts of the defendant limited its condemnation actions to the land only, not including the gravel contracts or business, and the plaintiffs were forced to bring a separate action under the Tucker Act. The plaintiffs might refer at this point to the Iowa law, which requires separate actions for determining the compensation to be paid for the land and the gravel rights, the Iowa Supreme Court holding that these rights are several and separate and not joint. Also, under the Iowa law the gravel rights must be compensated for, and there is no doctrine of frustration in Iowa.

In Iowa the leading case on the general subject is Comstock v. Iowa State Highway Commission, 254 Iowa 1301, 121 N.W. 2d 205 (1963) in which the Iowa State Highway Commission after settling for the fee of the land brought condemnation against a gravel lease. There is no Iowa court of claims and under Iowa law the State can be compelled to bring condemnation proceedings. Recovery was had in the lower court and the Supreme Court of Iowa, affirming, said:

> A leasehold interest is property and when taken in the exercise of eminent domain is compensable. Korf v. Fleming, supra; Batcheller v. Iowa State Hy. Comm., 251 Iowa 364, 368, 369, 101 N.W. 2d 30; Wicks v. Iowa State Hy. Comm., ____ Iowa ____; 119 N.W. 2d 781, 787. The issue in the case at bar was the compensation due the owner of the leasehold and not the value of the land. The interests of the lessor and lessee were several and not joint. An award to one would in no manner affect or prejudice the other's rights. Batcheller v. Iowa State Hy. Comm., supra.

And, under Erie Rr. Co. v. Tompkins, 304 U.S. 64, 78, and under 28 U.S.C. 1652 set out in full in the first part of this petition the Iowa law should be the Rule of Decision in the cases at bar.

The plaintiffs refer again to the lower court's denial of their motion for leave to file second amendment, after the defendant had been permitted to introduce new matters into the case. The cases that uphold the plaintiffs' position are so numerous that the plaintiffs will cite but one of them.

The case is this Court's Foman v. Davis, Executrix, 371 U.S. 178, 182 (1962). This Court, referring to the mandate that leave to amend "shall be freely given when justice so requires" stated, "this mandate is to be heeded."

This Court also stated:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The Court of Claims gave no reason for its denial of the plaintiffs' Motion for Leave to Amend. And Rule 22 (a) (1) of the Court of Claims and Rule 15 (a) of Rules of Civil procedure of the United States District Court both require, in identical mandatory language, that leave to amend "shall be freely given when justice so requires. It is not justice, and a denial of the adversary prinicple, to refuse to allow one side to meet new matters introduced into the case by the other side.

Wherefore the plaintiffs petition that a Writ of Certiorari issue for the reveiw of the judgment and opinion of the Court of Claims of April 14, 1967, in which the defendant's motions for summary judgment were allowed and the plaintiffs' cross-motions were denied, for the reveiw of the said court's ruling of April 14, 1967, denying the plaintiffs' Motion for Leave to Amend, and for the review of said court's ruling of July 20, 1967, denying the

plaintiffs' Motion to Review and Vacate said judgment.

Respectfully submitted

Bert A. Bandstra
116 1/2 East Main Street
Knoxville, Iowa

CERTIFICATE OF SERVICE

The undersigned certifies that he is a member of the bar of this Court and that he served the above and foregoing Petition for a Writ of Certiorari by mailing a true copy thereof by prepaid air mail to each of the following persons:

The Solicitor General of the United States
Mr. Edwin L. Weisl, Jr., Assistant Attorney General
Mr. Howard O. Sigmond

Bert A. Bandstra